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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff,

vs.

Ct. App. 28,700
CR-2005-05712
(Bernalillo County)

ALICIA VICTORIA GONZALES,

Defendant.

REPLY BRIEF

Criminal Appeal from the Second Judicial District Court County of Bernalillo
The Honorable Neil C. Candelaria, District Judge

Jane B. Yohalem
P.O. Box 2827
Santa Fe, NM 87504
(505) 988-2826

Attorney for Defendant
Alicia Victoria Gonzales

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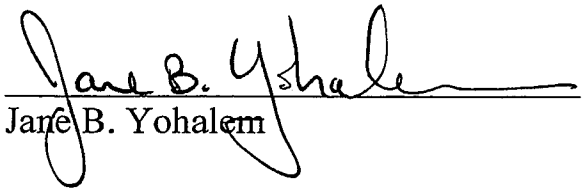
CITATIONS TO TRANSCRIPT OF PROCEEDINGS

The citations to the transcript of proceedings are made to the consecutively numbered volumes of the written transcript, followed by the page numbers. The format is as follows: TR. Vol 1, p. 1.

STATEMENT OF COMPLIANCE WITH RULE 12-312(g) NMRA

The body of the *Reply Brief* exceeds the 15-page limit established by this Court for reply briefs in cases on this Court's general calendar.

As required by Rule 12-312(G) NMRA, I certify that this *Reply Brief* is proportionally spaced and the body of the *Brief* contains 4,067 words, which is less than the 4,400 word maximum permitted by the rule. This *Brief* was prepared using WordPerfect, Version X3, and the word count was obtained from that program.



Jane B. Yohalem

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REPLY POINT I

OUR SUPREME COURT'S RECENT DECISION IN *STATE V. NOZIE* STRONGLY SUPPORTS DEFENDANT'S CONTENTION THAT KNOWLEDGE OF A CHILD'S PRESENCE IS A REQUIRED ELEMENT OF CHILD ABUSE

In its recent decision in *State v. Nozie*, 2009-NMSC-018, 146 N.M. 142, 207 P.3d 1119,[1] our Supreme Court provided direction on how to determine whether knowledge of the status of the victim is a required element of a criminal offense. *Nozie* addresses whether knowledge of the victim's identity or status as a peace officer is an essential element of the crime of aggravated battery upon a peace officer, pursuant to NMSA 1978, § 30-22-25 (1971). *Id.* at ¶ 1.

This question, of course, is closely analogous to the central issue in this appeal: whether knowledge of a child's presence is a required element of child abuse. *Nozie* holds that where a statute is silent as to whether knowledge of the victim's status or identity is a required element of a criminal offense, the Court must "resolve the question of knowledge on the basis of legislative intent." *Nozie*, 2009-NMSC-018, ¶ 26. If any ambiguity or doubt remains after completing the analysis of legislative intent, a presumption that knowledge is a required element of a crime applies to

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[1]*Nozie* was not addressed in the *Brief in Chief* in this matter. Counsel for Defendant was not aware of the decision until it was published in the Bar Bulletin shortly after the *Brief in Chief* in this matter was filed. The State discusses *Nozie* at page 18 of its *Answer Brief.*

resolve that ambiguity: "criminal intent is an essential element of the crime unless it is clear from the statute that the [L]egislature intended to omit the *mens rea* element." *Id.*; *Santillanes v. State*, 115 N.M. 215, 218, 884 P.2d 358, 361 (1993).

In determining legislative intent in the context of aggravated battery on a peace officer, § 30-22-25, the Court relied primarily on the language, history and purposes of that statute and on the severity of the penalties associated with a conviction. The Court noted that the purpose of creating the felony of aggravated battery on a peace officer is to protect police officers by deterring attacks against officers and by punishing more severely those who attack a police officer. The Court concluded that these purposes would not be served by a statute which imposes liability on a defendant who lacks knowledge of the officer's status as a police officer. The Court explained that deterrence depends on knowledge of the officer's identity: an individual's knowledge that an attack on a police officer will be treated as a felony and heavily punished does not deter an attack on someone who the defendant believes is simply a member of the general public.

Similarly, the Court concluded that the Legislature imposed higher punishment (18 months if the battery does not result in serious injury and three years if the battery causes great bodily harm or is committed with a deadly weapon) because an individual who knowingly attacks a police officer is especially blameworthy. The

Court noted that if the individual does not know that the person attacked is an officer, the conduct is no more blameworthy than any simple battery. *Id.* at ¶ 30.

The Court expanded on this analysis in its separate discussion of the penalties imposed by the Legislature for the crime of the aggravated battery upon a peace officer. *Id.* at ¶ 26. The Court found the 18 month sentence for aggravated battery which does not result in serious injury and the three year sentence for battery inflicting great bodily harm or committed with a deadly weapon to be an especially strong indicator of legislative intent to require knowledge of the police officer's identity as an officer as an element of the crime. The Court noted that such severe penalties generally are not imposed by our Legislature for strict liability crimes: crimes where little or no "moral condemnation and social opprobrium" attach. *Id.* at ¶ 26, *Santillanes*, 115 N.M. at 222, 849 P.2d at 365; *State v. Yarborough*, 1996-NMSC-068, ¶ 19, 122 N.M. 596, 930 P.2d 131 (strict liability crimes generally carry "relatively slight" penalties). The high level of social opprobrium and moral condemnation, of course, arise because the individual has battered someone he or she knows to be a peace officer.

These very same considerations apply in the context of this State's child abuse statute. Like the prohibition on battery on a peace officer, intended to protect officers by deterring attacks against officers and by punishing more severely those who

assault a police officer, the purpose of the child abuse statute is to protect children by deterring abandonment or abuse of a child and by punishing more severely those individuals who abandon or abuse a child, rather than an adult. As the Court explained in the context of a crime against a police officer, these purposes would not be served by a statute which imposes liability on a someone who lacks knowledge of a child's presence. Deterrence of child abuse, just like deterrence of battery against a peace officer, depends on knowledge of the victim's identity as a child. Treating child abuse as a felony and heavily punishing it does not deter intentional or criminally negligent conduct by a defendant who is entirely unaware of the presence of a child.

As in the case of aggravated battery on a peace officer, our Legislature imposed an especially high punishment for child abuse because an individual who knowingly abuses a child is especially blameworthy. If the abusive conduct endangers the general public and a child happens to be injured, the conduct is not the same highly morally reprehensible conduct which occurs when an individual either directs abusive conduct toward a child or engages in such conduct with knowledge of a child's presence. It is this high degree of moral reprehensibility based on misconduct directed to a child, with knowledge of the child's presence, which justifies the extraordinarily high sentences, ranging from three years to 18 years, our Legislature

has imposed for child abuse. *Id.* at ¶ 30. As our Supreme Court noted, it is inconsistent with the general practice of our Legislature to impose such severe punishment based on strict liability for injury to a child (as the State argues here). *Id.*

Finally, to the extent this Court concludes that confusion, ambiguity, or uncertainty remains as to the intent of the Legislature after reviewing the language and purposes of the child abuse statute, the presumption that criminal intent is an essential element of a felony must be applied to resolve that confusion. *Nozie,* ¶ 26 (we presume criminal intent is an essential element of the crime unless it is clear from the statute the Legislature intended to omit it).

REPLY POINT II

IF DEFENDANT'S CONVICTIONS OF CHILD ABUSE ARE REVERSED, RETRIAL IS NOT PERMITTED

In her *Brief in Chief*, Defendant asked this Court to remand for entry of a judgment of acquittal on the child abuse counts. In its *Answer Brief* (pp. 36-41), the State urges this Court to hold that, if Defendant prevails in this appeal, the State may both retry the Defendant for negligent child abuse and institute a new prosecution for great bodily injury and homicide by vehicle.

The State relies on *Hall v. Montana*, 481 U.S. 400 (1987), a *per curiam* decision by the United States Supreme Court interpreting the Fifth Amendment to the

United States Constitution's double jeopardy clause to permit retrial under the correct charge in a case where the state prosecuted under the wrong legal theory. The Court explained that the prosecution was misled by the legal maneuvers of the defendant into proceeding under a charge the prosecution could not prove. The Court held that, "[i]n these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction ... does not offend the Double Jeopardy Clause." *Id.* at 403.

The State argues that *Hall* applies to permit retrial in all cases in which an appellate court reverses a conviction because the state could not prove all of the elements of the offense charged, so long as the case can be characterized as one where the government prosecuted for the wrong offense.

The State's argument fails to recognize that the Supreme Court limited its decision in *Hall* to the circumstances described by the Court, finding that "[i]n these circumstances," federal double jeopardy principles justified retrial. The circumstances here are quite different and plainly do not involve a defendant who has snookered the prosecution, as was the case in *Hall.*

Moreover, the State, while acknowledging that there is New Mexico precedent which contradicts its position, fails to honor that precedent. See *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295; *In re Gabriel M.*, 2002-NMCA-047, 132

N.M. 124, 45 P.3d 64. The relevant New Mexico cases were decided after the Supreme Court's decision in *Hall.* They do not apply *Hall* to a case like this one, where the charging decisions were entirely the prosecution's. Instead, both cases recognize that the government failed to introduce sufficient evidence to prove an essential element of the offense charged, and acquit on that basis. *Id.* Retrial is not permitted under established principles of both state and federal double jeopardy law where a case is reversed because the state has failed to prove all elements of the crime charged beyond a reasonable doubt.

Finally, if *Hall* were to be given the expansive reading urged by the State, the double jeopardy analysis employed by our courts under the New Mexico Constitution, Art. II, § 15, would demand a different result in this case.

A. The State's Argument is Not Supported by the Supreme Court's Decision in *Hall*

As noted above, *Hall* is a *per curiam* decision. A *per curiam* decision is entered by the Supreme Court without briefing and oral argument, and gives very little explanation of the Court's reasoning. *Edwards v. Carpenter*, 529 U.S. 446, 452, n. 3 (2000). The Supreme Court has repeatedly stated that such decisions are of little precedential value and certainly should not be relied on to support a major deviation

from established constitutional law. *Id.; Connecticut v. Doehr*, 501 U.S. 1, 12 n. 4 (1991).

To the extent the Court in *Hall* provides any insight into reasons for this decision, it focuses on the role of the defendant in leading the prosecution into error, and then attempting to avoid conviction altogether because of that error. In *Hall*, the government had originally prosecuted the defendant for the correct offense: sexual assault. It was only after the defendant obtained a dismissal of the sexual assault charge, successfully arguing that incest, and not sexual assault was the correct charge because he was the victim's stepfather, that the state acceded and tried the defendant for incest, obtaining a conviction. Defendant then sought and obtained reversal on the basis that the state proved sexual assault, but that, as a stepfather, he could not be charged with incest. Noting that Montana tried the defendant for incest, rather than sexual assault, "at defendant's bequest," the Court concluded that:

> [i]n these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction ... does not offend the Double Jeopardy Clause.

Hall, 481 U.S. 400, 403.

Unlike *Hall,* in this case the Defendant did not contribute in any away to the State's choice of the statute under which to prosecute. Indeed, the record shows that the Defendant, from well before jeopardy attached, argued that the State could not

prove all elements of the crime of child abuse, because she was not aware of the child's presence in the other vehicle, and asked the State to prosecute under the vehicular homicide statute. TR. Vol.3, 32. The State insisted on its right to prosecute solely for child abuse; it refused to modify the charges and refused, as well, to discuss a plea bargain to any lesser charge. RP 290.

The principles adopted in *Hall*, assuming they have any precedential value given that *Hall* was a *per curiam* decision, are therefore plainly inapplicable in this case.

B. The State's Argument is Inconsistent with New Mexico Precedent

As the State acknowledges in its *Answer Brief* (at 38-39), the New Mexico appellate courts have not adopted their reading of *Hall.* In at least two New Mexico cases decided after the Supreme Court's decision in *Hall*, where the State contended that the defendant was prosecuted under the wrong criminal statute, this Court reversed the convictions for insufficiency of the evidence and ordered entry of a judgment of acquittal. *State v. Stein*, 1999-NMCA-065, 127 N.M. 362, 981 P.2d 295 (finding that where the defendant was prosecuted for battery on a household member, rather than simple battery, and the victim did not qualify as a household member under the statutory definition, the evidence was insufficient to support a conviction of the crime charged, requiring acquittal); *In re Gabriel M.,* 2002-NMCA-047, 132

N.M. 124, 45 P.3d 64 (this Court reached the same result where arson, rather than destruction of personal property was charged). *State v. Stein*, involved confusion about whether a child of the defendant was a "household member" under New Mexico's battery against a household member statute, the very same type of confusion about a stepfather-child relationship which was at issue in the *Hall* case. Yet, even given this obvious parallel between the cases, this Court did not follow *Hall.* Of course, there was no suggestion in either *Stein* or *Gabriel M.* that either defendant misled the prosecution or was in any way responsible for the State's decision to prosecute for the wrong offense.

C. Even if the United States Constitution Permits Retrial Under These Circumstances, the Double Jeopardy Clause of the New Mexico Constitution, Art. II, § 15, Precludes Retrial

Even if *Hall* were to be interpreted as creating a broad exception to the Fifth Amendment to the United States Constitution's bar on retrial after reversal for insufficient evidence, under the circumstances here, retrial is barred by the double jeopardy clause of the New Mexico Constitution, Art. II, § 15. Our courts determine whether a subsequent prosecution is barred by Art. II, § 15 of the New Mexico Constitution by looking to the purposes behind the State Constitution's bar on successive prosecutions and applying those purposes to the case before the Court. *State v. Powers*, 1998-NMCA-133, ¶¶ 23-29; 126 N.M. 114, 967 P.2d 454. Allowing

retrial of Defendant here would violate the purposes of our State constitution's bar on successive prosecutions.

Our Supreme Court has described the purpose of the bar on successive prosecutions as "to prevent the government from harassing citizens by subjecting them to multiple suits until a conviction is reached, or from repeatedly subjecting citizens to the expense, embarrassment and ordeal of repeated trials." *State v. Angel*, 2002-NMSC-025, ¶ 15, 132 N.M. 501, 51 P.3d 1155, *quoting State v. Lujan*, 103 N.M. 667, 671, 712 P.2d 13, 17 (Ct. App. 1985). The Court noted in *Angel* that, in addition to the these policies, the bar on successive prosecutions also prevents the State from rehearsing its presentation of proof in a first trial and then perfecting its presentation, to the defendant's detriment, in a second trial. *Id.*

In its decision in *State v. Powers*, 1998-NMCA-133, this Court applied these principles to evaluate whether the New Mexico Constitution prohibited successive prosecutions, even where the federal constitution did not. This Court weighed the interests served by the State's double jeopardy bar on successive prosecutions against what it found to be the countervailing interests of the State. *Powers* summarizes the defendant's interests implicated by successive prosecutions as the "interests in repose under the finality of a judgment, ... the interest in preventing prosecutorial overreaching or oppression and [the interest] in reducing the risk of erroneous

conviction by way of a rehearsed trial." *Id.* at ¶ 23. The prosecution's countervailing interests are identified by this Court as having "one complete opportunity to convict those who have violated its laws" and "insuring that justice is meted out." *Id.*

When these policies are applied here, it is evident that retrial of the Defendant for child abuse, or for homicide or great bodily injury by vehicle, if her conviction is overturned, is improper. First, this case involves overreaching by the prosecution. It was the prosecutor here who chose to charge Defendant exclusively with child abuse. Nothing prevented the prosecutor from charging the Defendant with child abuse and with homicide and great bodily injury by vehicle, in the alternative, in a single proceeding. *See State v. Santillanes*, 2001-NMSC-018, 130 N.M. 464, 27 P.3d 456.

By giving the jury no choice but to acquit the defendant altogether, or convict of child abuse, the State significantly increased its chances of a conviction on the child abuse charges. Knowing from the outset that it was breaking new ground by prosecuting for child abuse under these circumstances,[2] the State chose to make this a test case. It took the risk that a conviction of child abuse, if it succeeded in

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[2]The State acknowledged to the district court that there were no other prosecutions in New Mexico for child abuse where the children allegedly abused were not in the driver's car. TR. Vol. 3, 48. The prosecution was also unable, when questioned by the court, to explain why it chose to prosecute only for child abuse. TR. Vol. 3, 40.

obtaining one, would be reversed for insufficient evidence and that retrial for either child abuse or homicide or great bodily harm by vehicle would be barred. Having made this choice, the State should not be heard to complain now.

Moreover, the State here cannot place the blame on misleading conduct by the Defendant in the proceeding below (unlike the situation which so offended the Supreme Court in *Hall*). Ms. Gonzales argued from the outset, before jeopardy attached, that charging her with child abuse was improper because she was not aware of the presence of the children in the vehicle she struck, and that was a required element of the crime of child abuse. TR. Vol 3, 32 (November 2006, hearing). She attempted to negotiate a plea to an appropriate charge, but the State would not consider any sort of plea bargain. RP 290. This behavior by the State confirms that the State viewed this as a test case.

Allowing the State to put Ms. Gonzalez, a young mother with no criminal record, through the ordeal of another full trial under these circumstances would reward the prosecution for engaging in just the kind of overreaching the bar on successive prosecutions is designed to prevent. New Mexico's double jeopardy clause does not treat lightly the burden imposed on a defendant who, having withstood the stress and expense and embarrassment of one trial, faces a second trial. *Angel*, 2002-NMSC-025, ¶ 15; *State v. Manzanares*, 100 N.M. 621, 624, 674 P.2d

511, 514 (1983) (repeated attempts to convict subject an individual to "embarrassment, expense and ordeal by compelling him to live in a continuing state of anxiety and insecurity"). Moreover, allowing a retrial would encourage the State in the future to do just what it did here: maximize its chances of getting a jury to convict on a charge which is likely inapplicable, knowing that if its strategy is not successful, it can retry the defendant on either the same charge or on a lesser charge it should have included from the outset.

Allowing retrial here for child abuse, as the State requests, would also give the State the advantage of a rehearsed trial, increasing the risk of an erroneous conviction. The State had an opportunity to prove that Defendant was aware of the children's presence in the other car prior to impact. Indeed, it presented its evidence on this issue, but never made this argument to the jury, apparently recognizing that the evidence would not support a verdict on this basis. Having had its rehearsal, the State now suggests that it should be permitted to go back and make a better case the second time around. Double jeopardy principles plainly do not allow this.

Finally, the prosecution's interests here do not outweigh these important policies barring successive prosecution. The prosecution's interest in one complete opportunity to convict the Defendant was plainly vindicated here. The State was well aware of its options from the outset. It could have charged both vehicular homicide

and child abuse. It chose, for strategic reasons, not to do so. It is entitled only to one opportunity to convict the Defendant. In terms of the prosecution's interest in achieving a just result, Defendant has served time for aggravated DWI and leaving the scene of an accident of a minor accident moments before the events here. The sentencing judge found her both remorseful and very amenable to rehabilitation. Defendant has done time in prison. She has lived with the lack of finality and the stress of these proceedings hanging over her and her family for four long years. Most importantly, Defendant never tried to shirk punishment for her actions: she asked only that the charges be fair and appropriate. Under these circumstances, the important interests in discouraging prosecutorial overreaching, in finality, and in not allowing rehearsed trials outweigh the prosecution's interests.

Having failed to present sufficient evidence to convict on child abuse, the double jeopardy bar on successive prosecutions prevents the State from subjecting the Defendant to the rigors of a second trial, either to allow the State to muster more evidence of child abuse or to obtain a verdict on vehicular homicide and great bodily injury by vehicle.

D. This Court Should Address the Charges of Intentional Child Abuse in This Appeal

Defendant renews her request to this Court to apply the arguments made here on appeal to both Defendant's conviction of negligent child abuse and to the charges of intentional child abuse, even though those ended in a mistrial. *State v. Lobato*, 2006-NMCA-051, ¶ 34; 139 N.M. 431, 134 P.3d 122.

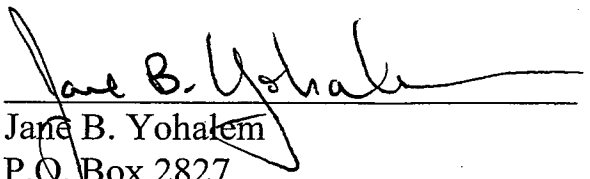
The State has argued in its *Answer Brief* (p. 32) that the relief sought here is barred by trial counsel's failure to separately appeal from the order granting a mistrial. Although counsel believes that the notice of appeal from the conviction and sentencing in this case is sufficient to allow this Court to provide direction on this issue, in order to put this contention to rest, appellate counsel has filed a supplemental notice of appeal in the district court and served this Court with a copy. Should this Court agree with the State that a separate notice of appeal is required, counsel asks this Court to deem the supplemental notice of appeal timely filed under the doctrine of presumptive ineffective assistance of counsel. That doctrine applies to allow an appeal to proceed in a criminal case despite late filing of a notice of appeal. *State v. Duran*, 105 N.M. 231, 731 P.2d 374 (Ct. App. 1986). The *Duran* decision makes clear that the right to appeal is so fundamental that, unless a criminal defendant has explicitly waived that right, the right to appeal is not lost by counsel's failure to file a timely notice of appeal. A late notice of appeal, even one more than a year late, will be deemed timely. *Id.*

Defendant has contended in her *Brief in Chief* that barring her from appealing and subjecting her to retrial because the jury could not agree on a verdict, when, for the very same reasons applicable to the counts of negligent child abuse, reversal would be required had Defendant been convicted, is patently unfair, violating her right to due process and subjecting her to double jeopardy under the New Mexico Constitution. Defendant renews the arguments raised in her *Brief in Chief* and contends, as well, that the State's overreaching in this case and Defendant's other double jeopardy arguments concerning retrial should be relied on by this Court not only to bar retrial for negligent child abuse and homicide and great bodily harm by vehicle, but also to bar retrial for intentional child abuse.

CONCLUSION

Defendant asks this Court to reverse and remand this matter for entry of a judgment of acquittal on all counts of negligent and intentional child abuse. In the alternative, Defendant asks for reversal and remand for a new trial on the grounds that highly prejudicial evidence was admitted at trial.

Respectfully submitted,

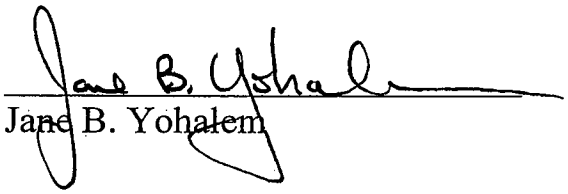


Jane B. Yohalem
P.O. Box 2827
Santa Fe, NM 87504-2827
(505) 988-2826

Appellate Attorney for Defendant Alicia Gonzales

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand-delivered to the Attorney General's Box in the Court of Appeals this 6th day of October, 2009.



Jane B. Yohalem